IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5932

JOHN DOE AND JANE ROE, *Appellants,*

v.

STATE OF DELAWARE, *Appellee.*

On Appeal From The Supreme Court of Delaware

BRIEF OF AMICI CURIAE

American Orthopsychiatric Association, Association for Children of New Jersey, Child Welfare League of America, Inc., Children's Defense Fund, Institute for Child Advocacy, National Association of Social Workers, Inc., New York State Citizens' Coalition for Children, North American Council on Adoptable Children, Inc., Youth Policy and Law Center

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of the American Orthosychiatric Association, Association for Children of New Jersey, Child Welfare League of America, Inc., Children's Defense Fund, Institute for Child Advocacy, National Association of Social Workers, Inc., New York State Citizens' Coalition for Children, North American

Council on Adoptable Children, Inc., and the Youth Policy and Law Center.*

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* (1) The American Orthopsychiatric Association is a national professional membership educational organization with over 8,000 members that brings together leading professionals in the disciplines devoted to mental health and the study of human behavior.

(2) The Association for Children of New Jersey is a nonprofit citizen organization which works to improve programs and policies affecting children in New Jersey through research, community education, and legislative and administrative advocacy.

(3) The Child Welfare League of America, Inc. is a national voluntary standard-setting organization with over 400 local affiliates, many of which are involved in providing services to children and their families, including foster care and adoption services.

(4) The Children's Defense Fund is a national nonprofit, public interest organization which has gathered evidence about the problems facing children at risk of or in out-of-home care in this country and is attempting to address these problems systematically, through litigation, legislation, and work with local and state organizations.

(5) The Institute for Child Advocacy, a citizen-based public interest organization, works primarily in Ohio to improve the systems that serve children, particularly those in foster care, by impacting on public policy through citizen organizing, administrative negotiation, legislation and litigation.

(6) The National Association of Social Workers, Inc. is the largest professional association of social workers in the world, comprised of 81,000 social workers with chapters in all fifty states and the District of Columbia.

(7) The New York State Citizens' Coalition for Children is comprised of approximately 45 foster parent and adoptive parent organizations throughout New York State.

(8) The North American Council on Adoptable Children, Inc. is a national organization representing over 250 adoptive parent groups who are united in the belief that every child has a right to a permanent family.

(9) The Youth Policy and Law Center, Inc., is a private nonprofit public interest organization in Wisconsin advocating simultaneously in the legislative, judicial and administrative branches of government for the rights of youth.

Amici share a deep conviction that the family must be preserved as the fundamental social unit in our society. In cases where children must be removed from their families, *Amici* believe that every reasonable effort should be made to make it possible for the child to be returned to his or her natural parents. Where return to the parents is not possible, we believe that each child is entitled to a permanent family, preferably through adoption.

Amici represent a vast range of professionals and agencies involved in meeting the needs of families and children in difficulty, as well as organizations of parents and others advocating on behalf of children who too frequently are removed from their homes inappropriately and left indefinitely in care, with little chance of permanence or security.

Amici submit this brief in order to inform the Court of the important consequences of this case for children in this country, many of whom are now being denied their fundamental right to permanence and family integrity by being left to linger in foster care, neither returned to their families nor provided new permanent families through adoption.

SUMMARY OF ARGUMENT

The Court in this case is faced with problems in the delicate and complicated area of state intervention into family life. We have filed this brief in order to present a point of view which is not fully represented by the parties to this case. We are concerned both that families are broken up and parental rights terminated for the wrong reasons and also that parental rights are not being terminated when children need to be freed from legal ties and provided new permanent families through

adoption. We are concerned with the harm to children in both situations.

Our concerns lead us to ask the Court to do three things: 1) to confirm that the children's interests at stake here are interests in permanent and continuous family relationships and that those interests are violated by state action which unnecessarily destroys either the permanence or continuity of these relationships; 2) to declare the Delaware termination of parental rights statute void for vagueness because its vague standards increase the probability that decisions to terminate or not terminate will harm children; and 3) to give guidance as to what are proper considerations to those who must design constitutionally adequate standards for termination of parental rights.

I.

1. The interests of children at stake when a state removes them from their family are substantial. There is universal agreement in the jurisprudence of this Court, the country's political traditions and scientific knowledge that children need a permanent and continuous relationship in a family, natural or adoptive, and are harmed by separation from the family. Protection of family ties flows in part from this recognition of children's needs. In addition, the country's commitment to family life flows from the recognition that state care throughout the years has proven to be harmful to children.

2. State statutes authorize the removal of "neglected" children from their families for indefinite periods of time or permanently. The stated purpose of state intervention into families is to strengthen families and to break them up only when the interests of the

child demand it. However, each time the state removes children from the physical custody of their parents, their interests in permanent and continuous relationships are threatened and they are subjected to the risks involved in state care. As the interests in family relationships are substantial, permanent removal of the child from the family through termination of parental rights should not occur unless there are compelling interests to justify it. We stress the crucial role of termination as an integral part of the entire foster care process because this Court's characterization of the interests at stake here will have a significant impact on all children at all stages of the child welfare system.

II.

1. Termination of parental rights is one measure a state may take to protect children. It is intended to insure that there is a potential exit from the impermanency of foster care when a child cannot be returned home. Termination proceedings have failed to perform this function. Terminations of parental rights are occurring inappropriately with no or little consideration of the needs of children and without efforts to keep families together. In addition, terminations are not occurring when the interests of the child in a permanent family demand them.

2. Vague statutes contribute significantly to the failure of termination proceedings to serve their function. They violate several basic principles of due process by delegating basic policy matters to state officials with no guidance to ensure appropriate decision-making, by encouraging arbitrary and discriminatory decision-making, by providing little opportunity for review of crucial decisions and by increasing the risks of harmful

decisions in an area where there is substantial likelihood of inappropriate decision-making.

2. Vague standards like "not fitted to continue to exercise parental rights" reflect outdated notions of the needs of children and do not serve current national goals. They were not developed to ensure the protection of family integrity nor to protect children from the harms of separation or of state care. As in the juvenile delinquency area, unbridled discretion has led not to individualized decision-making carefully adjusted to the needs of each child, but rather to the ignoring of their needs and harm to children. The "best interests of the child" standard was also not developed to ensure family integrity but was designed to be used when a family member, not the state, sought to destroy the family unit.

III.

The elimination of vague standards will not alone protect the due process rights of children in their familial relationships unless they are replaced by specific standards which focus on the child. The fundamental interests of children require that the harms of separation and state care as compared to the harms of remaining with the family be considered when children are removed from their families.

Specific standards which focus on the child rather than on parental conduct alone can be drafted. There exists a great deal of scientific knowledge which can guide and has guided both legislators in amending statutes and several eminent bodies in drafting model codes which contain constitutionally adequate standards.

ARGUMENT

I. Children's Fundamental Rights To Continuous And Permanent Family Relationships Are Violated By State Action Which Unnecessarily Destroys Those Relationships.

There is virtually universal agreement that families are vital to the healthy development of children. Children need to feel wanted and accepted; they need continuity in their relationships with their biological or psychological parents; they need a permanent relationship to give them a sense there is a regular, dependable quality to the world.[1]

The jurisprudence of this Court and this country's political traditions, as well as scientific knowledge, support the fundamental nature of children's interest in their continuous relationship in a family. Faced with state interference into familial relationships this Court has reviewed such activities with great concern, acknowledging the severe harm to each family member caused by state intervention.

All states have laws governing the protection of neglected children, which authorize the state to remove children from their families and to terminate familial rights. Because of the fundamental nature of children's interest in a permanent and continuous family relationship and the harm to them which accompanies breaking up of the family unit, decisions to remove children from their parents are ones involving "issues of unusual

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[1] *See* Advisory Committee on Child Development, *Toward a National Policy for Children and Families* (1976); Joint Commission on Mental Health for Children, *Crisis in Child Mental Health: Challenge for the 1970's* (1969); Keniston and The Carnegie Council on Children, *All Our Children: The American Family Under Pressure* (1977); and U.S. National Commission on the International Year of the Child, *Report to the President* (1980).

delicacy," *Smith* v. *Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 855 (1977), which require careful balancing of the interests of each family member and an understanding of how state decisions affect families.

Because we are concerned with the whole process of state intervention and the role of termination in it, we urge this Court to carefully characterize the interests of the child affected when the state intervenes into a family. The child's fundamental right to permanency and continuity in family relationships is threatened by termination of parental rights not only because termination involves the permanent severing of the legal relationship between child and parent, but also because it makes permanent the removal of the child from the physical custody of the parent. This careful characterization is necessary not only to an analysis of the constitutional standards for termination but also because of its impact on the standards for initial removal from the home and for indefinite maintenance of a child in the limbo of foster care.

A. Children have a fundamental interest in the continuity and permanence of family relationships.

This Court has had several occasions to note that the primacy "of parents in the upbringing of their children is now established beyond debate as an enduring American tradition," *Wisconsin* v. *Yoder,* 406 U.S. 205, 232 (1972), and has stressed the "sacred" nature of family ties, *Griswold* v. *Connecticut,* 381 U.S. 479, 486 (1965); the warm affectional ties, *Zablocki* v. *Redhail,* 434 U.S. 374, 384 (1978); the mutual sustenance and security in family life, *Moore* v. *City of East Cleveland,*

431 U.S. 494, 505 (1977) (plurality opinion).[2] Although the Court has spoken of the interest in family integrity, it has recognized that each family member, the child as well as the parent, has an individual interest in being part of a family.[3] The children's interest is in the permanency and continuity of the relationships that they enjoy as members of a family, relationships which are essential to their healthy development. Thus, this Court has recognized that the deference due family ties flows from the recognition that the state, as an "impersonal political institution is not competent to provide the intimacy, stability and emotional support necessary for a child's development," *Belotti* v. *Baird,* _____ U.S. _____, 99 S. Ct. 3035, 3045 (1979)(opinion of Powell, J.)[4] and has afforded great protection to existing family units.[5]

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[2] The Court has based its protection of the family on several constitutional provisions: "The home derives its preeminance as the seat of family life and the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right." *Poe* v. *Ullman,* 367 U.S. 497, 551-52 (1961) (Harlan, dissenting). Recent commentary argues that this Court's cases have established the due process clauses as the bases for special protection of "family" rights from state interference, Note, *Developments in the Law—The Constitution and the Family,* 93 Harv. L. Rev. 1156, 1166-68 (1980).

[3] Thus in *Caban* v. *Mohammed,* 441 U.S. 380 (1979), the Court recognized that the children had individual interests in being completely incorporated into a family unit, interests which might be distinct from those of their father or mother.

[4] "[The deference due familial ties has also] arisen from our historical commitment to diversity of views and lifestyles," *Moore,* 431 U.S. at 503-04.

[5] Where the Court has been presented with an *existing* parent-child relationship in which the father has "sired and raised" his children as in *Stanley* v. *Illinois,* 405 U.S. 645, 651 (1972), or has had a "substantial relationship with them," *Caban,* 441 U.S. 380, _____, 99 S. Ct. at 1969, it has granted the protection for the rela-

The Court's evaluation of the importance for children of preserving the continuity of family ties has been confirmed by psychological and sociological knowledge[6] which emphasizes the severe harm to the child caused by separation from the family.[7] Even where children have been removed from inadequate homes, separation from parents is extremely painful to the

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tionship sought. In *Stanley* the Court held the state must accord a father a hearing before removing his illegitimate children from his home. In *Caban* the Court invalidated a statute which required the consent of mothers but not of fathers before their illegitimate children could be adopted.

However, in *Quilloin* v. *Walcott,* 434 U.S. 246 (1978), where the Court viewed the parent-child relationship as one in which the father "never exercised actual or legal custody," 434 U.S. at 255, the Court refused to recognize his right to "veto" the adoption of his child by the mother's new husband and to stop the legal recognition of "a family unit already in existence." *Id.* at 255.

The custody disputes presented in *Caban* and *Quilloin* differ substantially from that presented here. In those cases some continuity of family relationships was to be preserved for the child as one natural parent would have custody of and legal ties to the child whatever the outcome. Here, as in *Stanley,* the children's family has been broken up by the state which is challenging the parents' right to custody.

[6] The child's need for continuity and a sense of belonging has recently been reiterated. Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* 31-34 (1973); Task Panel on Mental Health and American Families, *Report of the Sub-Task Panel on Infants, Children, and Adolescents,* in III *Task Panel Reports Submitted to the President's Commission on Mental Health* 26-27 (1978).

[7] The severe psychological harm of separation from the family is well documented. Bowlby, *Child Care and the Growth of Love* 13-20 (2d ed. 1965); Buxbaum, *The Problem of Separation and the Feeling of Identity,* Child Welfare 8 (1955); Geiser, *The Illusion of Caring: Children in Foster Care* 35-129 (1972); Goldstein, Freud and Solnit, *supra* note 6, at 19-20; Littner, *The Importance of the Natural Parents to the Child in Placement,* 54 Child Welfare 175 (1975); Littner, *Some Traumatic Effects of Separation and Placement* (1956).

child. *OFFER*, 431 U.S. at 837. Children need to be returned to permanent family relationships either with their natural parents or, if that is not possible, with adoptive parents without delay. Goldstein, Freud & Solnit, *supra* note 6, at 20.

With regularity in the last century, this country has reaffirmed its commitment to preserving family life as "the highest and finest product of civilization," and the need to keep children "as a general rule" with their parents. Letter from White House Conference on the Care of Dependent Children to the President of the United States Embodying the Conclusions of the Conference on the Care of Dependent Children, *reprinted in Proceedings of the Conference on the Care of Dependent Children* 192-94 (1909).[8] The reaffirmance of the national commitment has been prompted in part by continuous evidence of the state's inability to improve the lot of most children by removing them from their homes. Since the state began intervening in families there has been criticism of its care of its wards.[9]

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[8] The first White House Conference on Children was held in 1909. Since then conferences are held every decade and the commitment to the family reiterated. Beck, *The White House Conference on Children: An Historical Perspective*, 43 Harv. Educ. Rev. 653, 657-68 (1973).

[9] In the colonies, children removed from their parents by the state were "indentured" for work or training. An indenture was a contract which created the terms of the placement. Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. Rev. 293, 301; Areen, *Intevention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L. Rev. 887, 899 (1975). This system was widely criticized. New Jersey Pension Survey Commission, *State Care of Dependent Children in New Jersey, Report No. 5*, 9-10, and U.S. Children's Bureau, *Children Indentured by the Wisconsin State Public School* (1925), *excerpted in* 1 Abbott, *The Child and the State* 223-29 (1938).

Criticism of state care continues today. National Commission on Children in Need of Parents, *Who Knows? Who Cares? Forgotten Children in Foster Care* (1979) [hereinafter cited as National Commission].

B. Unnecessary removal from a permanent family violates children's rights.

In stressing the fundamental importance to the child of permanence and continuity in familial ties and the extreme harm that occurs to children when separated from their parents, we are not negating the necessity for state intervention when the parent-child relationship is harmful to the child. The interest and needs of the child may not always coincide with the interest and needs of the parent.[10] All states have statutes authorizing state action to protect children variously described as neglected, in need of assistance and dependent.[11] These statutes pro-

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A reform of the nineteenth century was the establishment of poor houses or alms houses to which children were sent along with "insane, indecent, and idiotic adults." Letchworth, *Report on Paupers and Destitute Children* in 2 Abbott, *The Child and the State* 68-71 (1938). These institutions soon received widespread criticism for the poor care of children. The latter half of the nineteenth century saw the creation of separate institutions for children which at their inception were recognized as offering inadequate care. In the nineteenth century, some states turned to foster care as an alternative to institutional care. But whatever the system, all states had difficulty insuring adequate care. Areen, *supra* note 9, at 905-08.

[10] This Court has recognized extreme situations where the interest of the child may conflict with the maintenance of the integrity of the family unit. A minor's pregnancy may "fracture" the family structure, *Planned Parenthood* v. *Danforth,* 428 U.S. 56, 75 (1976); a parent may seek to institutionalize his child because of family conflicts, *Parham* v. *J.R.*, _____ U.S. _____, 99 S. Ct. 2493, 2509 (1979).

[11] A typical statutory definition of "neglected child" is a person under 18 years of age, abandoned, and/or lacking proper parental care, control or guardianship, and whose parent, guardian or custo-

vide for an array of protective measures that may be taken on a child's behalf, including termination of parental rights, the permanent removal of the child from the home.

However, the stated purpose and theory of state intervention into the family is declared by all states to be the strengthening of families; families are to be broken up only when the child's interest cannot be safeguarded without removal.[12] State statutory schemes place responsibilities for intervention in a state agency which is to investigate any complaint of child neglect. In many states the agency is authorized to seek a voluntary arrangement with the parent whereby services are provided to the family or to petition a court for authority to act. Del. Code tit. 10 § 933 (Supp. 1978). The agency may remove the child from the home on an emergency basis pending the adjudication. Following a hearing and an

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dian refused or was unable to provide necessary medical, surgical or other special care made necessary by the child's particular condition. A "dependent" child and a child "in need of assistance" are defined similarly. Katz, Howe, McGrath, *Child Neglect Laws in America*, 9 Fam. L.Q. 1, 70 (1975). Throughout this brief, "neglected" and "neglect" shall be used.

[12] In an article summarizing and digesting neglect statutes, commentators have described a "typical" child neglect statute as containing a purpose clause stating that the intent of the law is to be liberally construed: "to secure care, guidance and discipline for each child, preferably in his own home; to preserve and strengthen family ties whenever possible, removing him from the care, custody and discipline of his parents, only when his welfare or safety and the protection of the public cannot be adequately safeguarded without removal; and when removed, to secure care, custody and discipline as nearly as possible equivalent to that which should have been given by his parents." Katz, *supra* note 11, at 70.

adjudication of neglect, the court may make either of two types of dispositions of a case if the allegations are proven: protective supervision by the court in the child's own home with specified services to be provided; or placement of the child outside the home and transfer of legal custody to a public agency or other persons. Del. Code tit. 10 § 937 (Supp. 1978). *See generally* Wald, *State Intervention on Behalf of 'Neglected' Children: Standards for Removal from their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights,* 28 Stan. L. Rev. 623, 629-630 (1976) [hereinafter cited as Wald I].

Children who are removed from their families are placed by the state in foster homes or in institutions for care. Such placements are intended to be *temporary* and transitional until the child can be returned to a permanent setting either by return home or integration into an adoptive home. *OFFER,* 431 U.S. at 824-25, 833. Termination of parental rights causes the permanent removal of the child from the parents and the severing of all legal ties. [13] It is designed to make full integration into a new family possible through adoption by the severance of old legal ties.[14] However, termination of

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[13] A "typical" definition of termination is: "the permanent elimination by court order of all parental rights and duties, including residual parental rights and responsibilities." Colo. Rev. Stat. Ann. § 22-1-8 (1973). Katz, *supra* note 11, at 55.

[14] Termination statutes were designed to correct perceived problems in the adoption process: the provisions on who had to consent to adoption were unclear, leading to natural parent challenges to adoption; the tendency to compare the natural parents with the proposed adoptive parents in the adoption proceeding was considered unfair to the natural parents; and adopting parents often desired to maintain confidentiality. Goldberg, *Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children,* (Children's Bureau Publication No. 394 1961).

parental rights can occur in many states before there are potential parents who wish to adopt the child.[15] Thus, termination is not the last step of the process. After termination, an adoptive family must be found for the child.

Decisions to terminate or not to terminate implicate children's fundamental interests in continuous and permanent family relationships, relationships which are essential to their healthy development. This is true not only because legal ties are broken, but also because decisions to separate children from their parents, whether for permanent or indefinite periods of time, destroy the continuity and permanence of their relationships and may cause serious harm to children.

As the interests of the child and parents in the maintenance and continuity of their relationship are "substantial," *Stanley* v. *Illinois,* 405 U.S. 645, 652 (1972), and "absent a powerful countervailing interest," warrant protection, *id.* at 651, each time a state removes children from their parents permanently or indefinitely destroying the continuity of their relationships and subjecting them to harms of separation and of state care, there must be a compelling interest requiring removal. When the purpose of the state in removing children is to protect them from harm, it should not remove unless

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[15] Only seven states provide for termination solely in the context of an adoption proceeding: Arkansas, Ark. Stat. Ann. § 56-220 (Supp. 1979); California, Cal. Civ. Code §§ 232(a)(2), (7) (West Supp. 1979); New Mexico, N.M. Stat. Ann. § 40-7-4-B(4) (Supp. 1979); Pennsylvania, Pa. Stat. Ann. tit. 1 § 311 (Purdon Supp. 1977); Illinois, Ill. Rev. Stat. ch. 37 § 705-9(3), ch. 40 § 9.1-1(D)(m) (West 1975, Supp. 1979); Massachusetts, Mass. Gen. Laws Ann. ch. 210 § 3(a)(ii), 210 § 3(b) (West Supp. 1979); Rhode Island, R.I. Gen. Laws § 40-12-15 (1977).

the children are subjected to greater harm in the home than they suffer by separation and state care.

Because of the interrelation of neglect and termination standards and proceedings, see note 42 at p.28 *infra,* the Court's characterization of the interests at stake here will affect the probability of whether children's rights are violated at the initial removal as well as the termination stage. That is, no matter what the Court does in this case it will have a far-reaching impact on the entire foster care process. Thus, much will be done to protect children if the Court, in reaffirming the nation's commitment to the family and the need for "powerful" state interests to justify state intervention, makes it clear that removal of a child from the home for indefinite periods, as well as permanently, seriously implicates fundamental interests of the child. Such a ruling will help correct the current failure of termination proceedings to accomplish their function, which we discuss next in this brief, and will protect many children from inappropriate removal from their families. Children will be thus saved from the intolerable state of limbo in which the state does not return them home but does not have grounds to seek to terminate parental rights so as to provide new permanent families through adoption.

II. Vague Standards Increase The Likelihood That Termination Proceedings Will Not Protect Children.

Termination proceedings have not accomplished the function for which they were developed: to conclude the temporary status of the child when return to the home would be harmful and integration into another permanent family through adoption is to be encouraged. In-

stead, parental rights are being terminated inappropriately without attention to the needs of the child and the harm to children of termination, and with few efforts first to avoid removal or to reunite the family after removal. At the same time, in other cases termination proceedings are not occurring when the children's needs demand them. There is a great deal of empirical evidence of these failures. Thus, as this Court has had recent occasion to note, the result of neglect intervention is a system widely condemned by commentators for causing great harm to children. *OFFER,* 431 U.S. at 833-83.

Because of several basic offenses to the principles of due process, vague standards increase the likelihood of inappropriate terminations of parental rights which violate family members' rights to the integrity of their unit and cause serious harm to children. Also, they discourage termination of parental rights in situations in which the child is thereby caused further harm by being left in the impermanence of foster care.

The "historical credentials" of termination of parental rights standards, which provide only "parental unfitness" and "best interests of the child" as standards, like the "parens patriae" justification for exclusion of juveniles from constitutional protections rejected by the Court in *In re Gault,* 387 U.S. 1 (1967), are "of dubious relevance" and their interpretation is likewise "murky." *Id.* at 16. The "murkiness" of standards such as "not fit to exercise parental rights" and "best interests of the child" results in part from their historical credentials: they were developed not to insure the safeguarding of family autonomy and integrity, the purported present purpose of their use, but to further other state goals which have since been rejected by

courts and legislatures or which have never been applicable to termination decisions.

A. Termination has not served its function in protecting children from harm.

1. *Parental rights are being terminated inappropriately when there have been few efforts to avoid removal or to reunite the family.*

Rather than there being protection of children's and parents' interests in the continuity and permanence of the family unit with removal from the home only when, and only for as long as, necessary to protect the child, families are being broken up unnecessarily and children subjected to the harms of state care. Although removal is only one of many alternatives available, neglect hearings commonly result in removal rather than protective supervision in the home.[16] Once children are removed, services which could help reunite the family are rarely offered.[17] In fact, agency policies often discourage

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[16] Studies have shown the high incidence of removal as the disposition at neglect proceedings. One commentator has suggested 50% of such proceedings end with removal. Wald I, *supra* at 626 n.4. Unnecessary removals occur because services which could prevent the need for placement (day care or homemaker services, or treatment programs for handicapped children) do not exist or exist but are not used effectively. Children's Defense Fund, *Children Without Homes: An Examination of Public Responsibility to Children in Out-of-Home Care* 15-21 (1978) [hereinafter cited as Children's Defense Fund]; Vasaly, *Foster Care in Five States: A Synthesis and Analysis of Studies from Arizona, California, Iowa, Massachusetts and Vermont* 24-27(1967).

[17] Natural parents are typically not offered rehabilitative services after the children are removed. For example, a North Carolina study reported that 59% of the natural parents surveyed said they received no services after their child was placed in foster care. Governor's Advocacy Council on Children and Youth, *Why Can't I*

reunification. For example, little effort is made to facilitate parental visiting, although visitation is a significant predictor of the likelihood that a child will be able to return home and is extremely significant in resolving the identity conflicts arising for children from separation.[18] In addition, parents are sometimes denied information about their children in placement. They may not even be notified when their children are transferred from one placement to another.[19] Deprived of contact with each other and of services to reunify them, families are broken up. Parental rights are then

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Have a Home? A Report on Foster Care and Adoption in North Carolina 48-49 (1978). A survey of a random sample of 160 natural parents of children in foster care in Massachusetts in 1971 revealed too that there had been little service provided the families since the child's removal, although only 17% of the parents indicated they did not intend to take the child back, and over 40% indicated their family situation had not changed or had deteriorated since the child's removal. An Arizona study similarly reported that 56% of the mothers of children in care were not offered services during placement. Vasaly, *supra* note 16, at 34-35.

[18] In a five-year longitudinal study of children in foster care in New York City, patterns of parental visiting proved to be the best indicator of whether the children returned home. Sixty-six percent of the children who received no visiting during the first year in care were still in care five years later. In contrast, only 27% of the children whose parents visited on all occasions permitted by the agency were still in care at the end of five years. Fanshel and Shinn, *Children in Foster Care: A Longitudinal Investigation* 93-98 (1978). A study of over 5,000 children in Iowa reported similar positive correlations between continuing meaningful parental contact with the child and the likelihood of the child's return home. Vasaly, *supra* note 16, at 63. Other studies have documented the importance of visiting to identity formation. Geiser, *The Illusion of Caring: Children in Foster Care* 68-80 (1973); Weinstein, *The Self-Image of the Foster Child* 17 (1960). Yet, in spite of the significance of parental visiting for children, agency policies typically do not encourage parental visiting. Rather, policies which do exist are often restrictive, thus discouraging visits. Children's Defense Fund, *supra* note 16, at 22-23.

[19] Children's Defense Fund, *supra* note 16, at 23-24.

terminated inappropriately when the child might have been able to be returned home.

2. *Parental rights are not being terminated when there is little possibility that the parent-child ties can be re-established without harm to the child.*

Some judges faced with the failure on the part of state agencies to provide services and facilitate reunification are reluctant to terminate parental rights even when they do not think a child can be returned home.[20] Judges may deny termination petitions but then refuse to order the child returned home.[21] Social workers too often do not seek termination of parental rights even

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[20] In at least seven jurisdictions, courts have denied termination of parental rights where the service agency has either failed to provide services aimed at reunification or has provided inadequate or misleading information about parental responsibilities, parental access to children, services available or agency concerns. *In re Taylor,* 334 N.E.2d 194 (Ill. App. Ct. 1975); *Mahoney* v. *Arizona Department of Economic Security,* 24 Ariz. App. 534, 540 P.2d 153 (Ct. App. 1975); *In re Christopher H.,* 577 P.2d 1292 (Okla. 1978), *concurring opinion* at 580 P.2d 143; *C.S.* v. *Smith,* 483 S.W.2d 790 (Mo. Ct. App. 1972); *In re Susan Lynn M.,* 125 Cal. Rptr. 707, 53 Cal. App. 3d 311 (Ct. App. 1975); *State* v. *Robert H.,* 393 A.2d 1387 (N.H. 1978); *In re Anita "P.P."* (N.Y. App. Div. 12/7/78) 3 Fam. L. Rep. (BNA) 2177. *But see In re W.M. III,* 393 A.2d 410 (Pa. 1978) (agency services desirable but not mandated by state law); *In re Hirsch,* 402 N.Y.S.2d 743, 93 Misc. 2d 399 (Fam. Ct. 1978) (extraordinary circumstances of child may relieve agency of responsibility for making "diligent efforts"); *Matter of Ray M.,* 376 N.Y.S.2d 431, 37 N.Y. 2d 619 (Ct. App. 1975) (agency need not make "diligent efforts" if they are against child's best interests).

[21] Many observers have noted that even though many judges do not terminate they still may not return the child to the parents. Wald I, *supra* at 689; Mnookin, *Child Custody Adjudications: Judicial Functions in the Face of Indeterminancy,* 39 Law & Contemp Prob. 226, 273 (1975) [hereinafter cited as Mnookin I]; Maas & Engler, *Children in Need of Parents* 390-91 (1959).

when there has been no contact between child and parents for long periods. In fact for too many neglected children in state care, there is little chance for return home or for termination of parental rights and adoption.[22]

Children removed pursuant to neglect proceedings remain in foster care for long periods of time — on an average of five years — without any permanent family.[23] While in care for long periods, children are frequently subjected to multiple changes in placements, repeatedly moved from one foster home or institution to another, at extreme psychological cost.[24] Generally the probabili-

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[22] In some states like North Carolina, the number of children expected to return home is limited (about 20% of the cases), but at the same time the effort to terminate parental rights and free children for adoption is a slow process. At the time of the state study of foster care, over 300 children were awaiting termination. Governor's Advocacy Council on Children and Youth, *supra* note 17, 62-67. Studies in other states show similar patterns. Vasaly, *supra* note 16, at 68-74. *See* Wald I, *supra* at 632. Many commentators also agree that few terminations occur: Wald I, *supra* at 635 n.59; Mnookin I, *supra* note 21, at 217 n.39. We show below some of the reasons for this reluctance to terminate. See pp. 25, 28-30 *infra*.

[23] This Court has already seen evidence that children stay in foster care for much longer than contemplated by the theory of the system: "The District Court found as a fact that the median time spent in foster care in New York was over four years." *OFFER*, 431 U.S. at 835. In Delaware, the average child spends seven years in care. National Commission, *supra* at 23-33.

[24] The record in *OFFER* showed that nearly 60% of the children in foster care in New York City had experienced more than one placement, and about 28% had experienced three or more. *Id.*, 431 U.S. at 837. Data from studies of foster care in Arizona, California, Iowa and Massachusetts, as well as from two national studies have revealed similar placement patterns. Vasaly, *supra* note 16, at 55-57; Children's Defense Fund, *supra* note 16, at 40-41; National Commission, *supra* at 32-33. The psychological damage done to children by repeated moves has been well documented. Buxbaum, *supra* note 7, at 13-14; Geiser, *supra* note 17, at 88-90; Kadushin, *Child Welfare Services* 445 (3d ed. 1974).

ty of a child's returning home or being adopted decrease rapidly after a child has been in care for over two years.[25] This impermanence of foster care is extremely harmful to a child.[26]

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As all the facts are not known in this case, we do not know if the decision to terminate met the needs of Bill, Amy, Charles, Ellen and David. As the record below was sealed, we do not know if there was sufficient evidence for a correct decision to be made. It is impossible to determine this from the decisions below as they do not discuss the possibility of returning the children home but focus on the parents' conduct and their relationship to each other. The decisions below do not indicate whether the parental conduct harmed the children or whether the conduct, if harmful, caused more harm than separation from the parents.[27] The decision to terminate in this case, like so many other termination decisions, does not reflect consideration of the harms to children that are caused by termination.

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[25] *See* Fanshel and Shinn, *supra* note 18, at 120-21; Maas and Engler, *supra* note 21, at 421; Vasaly, *supra* note 16, at 54.

[26] In a study of 144 children in foster care, Bryce and Ehlert concluded: "It is our conviction that no child can grow emotionally while in limbo, never really belonging to anyone except on a temporary and ill-defined or partial basis. He cannot invest except in a minimal way (just enough to survive) if tomorrow the relationship may be severed . . . to grow the child needs at least the promise of permanency in relationships and some continuity of environment." Bryce and Ehlert, *144 Foster Children,* 50 Child Welfare 499 (1971). *See* Geiser, *supra* note 18, at 35-129.

[27] Therefore, we are unable to take a position on the current disposition for the children in this case if the Court declares the termination statute to have violated the parents' constitutional rights and reverses the decision of the Supreme Court of Delaware. At that point it would be necessary for the Superior Court to hold a hearing, hear new evidence on the status of the children and their parents and make a determination in accord with the principles that this Court will enunciate.

B. Vague statutes do not protect children from harm.

Vague statutes contribute significantly both to the likelihood of inappropriate terminations of parental rights without consideration of the children's needs and to the likelihood of the failure to terminate when the child's interests would be served. Vague termination statutes[28] violate several basic principles of due process:[29] they delegate basic policy matters to state officials, they encourage discriminatory decision-making, they provide little opportunity for judicial review, and they increase the risks of harmful decisions.

1. Vague statutes allow social workers and judges to resolve sensitive questions regarding family life on the basis of personal values as to appropriate child rearing techniques, an area in which there is little agreement. The terms themselves do not offer guidance to social workers and judges as to what factors they should con-

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[28] There has been widespread criticism of the common use of vague language in neglect and termination statutes. Wald I, *supra* at 629, 639-41; Mnookin I, *supra* note 21, at 268; Note, *Child Neglect: Due Process for the Parent,* 70 Colum. L. Rev. 405 (1970); Note, *Developments in the Law, supra* note 2, at 1232; Daly, *Termination of Parental Rights and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale,* 16 J. Fam. L. 213 (1977-78).

[29] The "void for vagueness" rationale for invalidating statutes has most often been applied in the criminal context, Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960), but it has also been held by this Court to apply to civil statutes. *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966). In addition, in deciding when to review a statute for vagueness the Court has looked at the seriousness of the "disability or restraint." *Jordan* v. *DeGeorge,* 341 U.S. 223 (1951); *Kennedy* v. *Mendoza-Martinez,* 273 U.S. 144 (1963). Termination of parental rights, although a civil proceeding, involves fundamental interests in family life.

sider. "Not fit to continue to exercise parental rights" and "best interests of the child"[30]are so vague that "men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally* v. *General Const. Co.,* 269 U.S. 385, 391 (1925). As there is no agreement as to what is a "fit" parent nor what is the "best interest of the child,"[31] judges and social workers operating under vague statutes have only personal values about child-rearing to guide them.[32] Thus, vague statutes "impermissibly delegate basic policy matters to . . . judges and . . . [social workers] for resolution on an ad hoc and subjective basis." *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-09 (1972).

The initial application of these vague standards is made by social workers in public and private child welfare agencies, many of whom have insufficient training to enable them to make crucial decisions without guidance on whether to remove children, return them home or prepare them for adoption.[33] Also, the typical

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[30] This Court has used these terms but not to provide guidance as to the constitutional adequacy of state statutory standards. Rather, it has used these terms to state general principles of constitutional law. *Stanley, supra; Caban, supra.*

[31] Our historic commitment to diversity and freedom to choose lifestyles has militated against acceptance of any national standard of child rearing. *Belotti,* 99 S. Ct. at 3045.

[32] As one commentator concluded from an examination of available court decisions, "a judge's attitude toward child rearing, sexual mores, religion, or cleanliness can affect the result of court proceedings." Mnookin I, *supra* note 21, at 269-70.

[33] A recent Department of Health, Education and Welfare-funded national study of social services to families and children reported that three out of four children being served by public social service departments in this country were assigned to staff who were dependent on in-service training to acquire whatever knowledge or skill about families and children they brought to their work. Shyne and

child welfare worker has a large caseload, leaving little time for individualized attention to individual cases and children.[34] As vague laws do not inform child welfare workers what is expected of them, many workers are unable and fail to plan appropriate placement and services for children in their charge.[35]

In the absence of any articulation of standards for when to return a child home or to terminate parental rights, there is little effort to periodically review the status of children in care and to force dispositions in individual cases so as to provide permanence in a manner appropriate to the needs of each child. Only about 25 states currently require periodic review of children in

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Schroeder, *National Study of Social Services to Children and Their Families* 147-48 (1978). *See* Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause,* 4 Suffolk L. Rev. 632, 641-44 (1970). Several studies have evidenced the vast disagreement among social workers on the application of vague criteria to decisions to remove a child from home. *See* Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Ed. Rev. 599, 619 (1973) [hereinafter cited as Mnookin II]; Richan, *Personnel Issues in Child Welfare,* in *Child Welfare Strategy in the Coming Years* 227, 231-33 (DHEW Publication No. OHDS 78-30158 1978); Wald I, *supra* at 1001-02 n.98.

[34] The National Commission on Children in Need of Parents in its inquiry into the failures of the foster care system found estimates of 50 to 90 cases per worker in the majority of the 34 states for which data were available. National Commission, *supra* at 36-37.

[35] For example, "the average child in foster care in North Carolina has spent 40% of his life in foster care, without a permanent home. More than half this time in foster care is being spent without any plan for the child's future." Governor's Advocacy Council on Children and Youth, *supra* note 17, at vi. When plans do exist, too frequently they simply call for continuation of foster care. Governor's Advocacy Council on Children and Youth, *supra* note 17, at 59; Jeter, *Children, Problems and Services in Child Welfare Programs* (1963); Wiltse and Gambrill, *Foster Care 1973: A Reappraisal,* 32 Public Welfare 7 (1974).

foster care by a body independent of the agency providing care. Children's Defense Fund, *supra* note 16, at Appendix L. The lack of guidance to social workers perpetuates a "rescue" syndrome in which some workers lose sight of their appropriate role[36] and act too quickly seeking to terminate parental rights prematurely. Or other workers often find it difficult to act at all because they do not know what will be expected by the judge who will decide the case. Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards,* 27 Stan. L. Rev. 985, 1001 n. 97 (1975) [hereinafter cited as Wald II],

As this Court has already noted, "judges too may find it difficult, in utilizing vague standards like 'the best interests of the child', to avoid decisions resting on subjective values." *OFFER,* 431 U.S. at 835 n.36. They are not trained to make without guidance delicate decisions on what is appropriate for a given child. Wald I, *supra* at 640 n.83; Mnookin I, *supra* note 21, at 671-72. Vague statutes do not instruct them as to what factors to consider and how to measure them.[37]

The decision in this case demonstrates the lack of guidance vague standards offer to courts. The Superior Court had no guidance as to how to measure or apply the "best interests" standard, and, as a result, its decision reflects its disapproval of the parents but little con-

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[36] Numerous commentators have discussed this syndrome. Platt, *The Child Savers* (1969); Levine, *Caveat Parens: A Demystification of the Child Protection System,* 35 U. Pitt. L. Rev. 1 (1973).

[37] In recognition of the need to further advise judges about the harms of the foster care system, and the importance of post-dispositional review hearings in which the appropriateness of each child's continued placement is carefully considered, the National Council of Juvenile and Family Court Judges is in the process of developing a Bench Book for its judges.

sideration of the children's needs or the harms threatening their interests.

2. Inadequate standards for decision making are particulariy unfair because of the considerable differences in life styles between the subjects of termination proceedings and those making decisions—judges and agency social workers.[38] Minority children are especially vulnerable to the harms of the child welfare system[39] Biases against the poor significantly affect decisions concerning initial removal and eventual return, and are in part responsible for the overrepresentation of the poor in the foster care system.[40]

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[38] Vagueness is particularly harmful in this area in that decision-making is "shaped by a service enterprise and a professional culture dominated by middle class, majority assumptions, and a tendency to read pathology into behavior that does not conform." Richan, *supra* note 33, at 232.

[39] A study of child welfare in Arkansas, for example, reported that 22% of the black children in care had been there for over ten years, as contrasted with only 2% of the white children. Seventy-seven percent of the white children had been in care *less* than two years; 60% of the black children had been in care *over* three years. The average length of stay in foster care for a white child in 1978 was 7.52 years, for a black child 12.76 years. Masem, *Child Welfare in Arkansas* 12-13 (1979). See also Billingsley and Giovannoni, *Children of the Storm: Black Children and American Child Welfare* (1972).

[40] One study showed that while only 3% of the families in the general population were on public assistance, 42% of the neglect families were relief recipients. Boehn, *The Community and the Social Agency Define Neglect,* 43 Child Welfare 453, 459 (1964). "In Massachusetts, in 1971, 61 percent of children in foster care came originally from families with incomes under $5,000; only 6 percent came from families with incomes over $10,000." Keniston and The Carnegie Council on Children, *supra* note 1, at 32. More recent state data have revealed similar patterns. See, for example, Governor's Advocacy Council on Children and Youth, *supra* note 17, at 17; New Jersey State Legislature Office of Legislative Services, Division of Budget and Program Review, *Characteristics of DYFS Children in Residential and Foster Care* 14-15 (1979). Other

3. There is little opportunity for review of the decisions. In this area which is of fundamental importance to those affected and where the probabilities of violations of interests are so high, vague standards do not require careful articulation of the bases for decisions. Without specific articulation of reasons, a reviewing court cannot determine when inappropriate considerations have entered into decision-making.[41]

4. The risk of children being harmed by vague termination of parental rights standards is especially high because the vague termination standards are applied on top of vague standards for removal in the initial neglect proceeding. In most states the same or similar vague standards are grounds for initial removal from the home and for termination.[42] The double vagueness[43] harms

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reasons also partially account for the overrepresentation of the poor in the child welfare system. Mnookin II, *supra* note 33, at 619; Rein, Nutt and Weiss, *Foster Family Care: Myth and Reality,* in *Children and Decent People* (Schorr ed. 1974).

[41] There has also been criticism that parents are deprived of due process because they are not given adequate notice of what conduct will lead to removal of children and termination of parental rights, and are unable to present adequate defenses in judicial proceedings because of the inability to predict upon what grounds the court will base its decision. Mnookin I, *supra* note 21, at 260-262. This latter problem is further exacerbated by the lack of counsel for parents and/or children in neglect proceedings, Wald I, *supra* at 30 n.28, which occurs because of parents' lack of financial means to afford counsel and the inability of publicly funded attorneys to represent the poor in all legal proceedings affecting them.

[42] In 20 states, removal and termination are dispositional alternatives at neglect proceedings, often with no or little guidance as to which to order: Alabama, Ala. Code tit. 12 § 12-15-71 (1975); Alaska, Alaska Stat. § 47.10.080(c) (1979); Colorado, Colo. Rev. Stat. § 19-3-111 (1973); Connecticut, Conn. Gen. Stat. Ann. § 17-43a(a) (West Supp. 1980); District of Columbia, D.C. Code § 16-2320 (West 1967); Florida, Fla. Stat. Ann. § 39.41 (West 1979); Georgia, Ga. Code Ann. § 24A-3201(a)(2) (Supp. 1979); Iowa, Iowa Code § 232.115 (Supp. 1979); Kansas, Kans. Stat.

children: vague standards encourage removal at the neglect proceeding but often discourage termination.

§ 38-824 (Supp. 1979); Kentucky, Ky. Rev. Stat. § 199.600 (1977); Minnesota, Minn. Stat. § 260.235 (Supp. 1979); Nebraska, Neb. Rev. Stat. § 43-209 (1978); North Carolina, N.C. Gen. Stat. § 7A-289.32(2) (Supp. 1979); North Dakota, N. Dak. Cent. Code § 27-20-44 (Supp. 1979); Ohio, Ohio Rev. Code Ann. § 2151.353 (1970); South Carolina, S.C. Code § 20-10-170 (1976); South Dakota, S. Dak. Compiled Laws Ann. §§ 26-8-35, 26-8-36 (Supp. 1979); Vermont, Vt. Stat. Ann. tit. 33 § 656 (Supp. 1979); Virginia, Va. Code §§ 16.1-279, 16.1-283 (Supp. 1979); West Virginia, W. Va. Code § 49-6-5 (Supp. 1979).

In 23 states a prior adjudication of neglect is grounds for termination. Some jurisdictions require only an additional finding that termination is in the child's best interests: District of Columbia, D.C. Code § 16-2354(b) (West Supp. 1978); Florida, Fla. Stat. Ann. § 39.41(a)(d)(1) (West 1979). Some states require only an additional finding that conditions which resulted in prior adjudication of neglect are likely to continue: Connecticut, Conn. Gen. Stat. Ann. § 17-43a(a) (West Supp. 1980); Hawaii, Haw. Rev. Stat. § 571-61 (Supp. 1979); Michigan, Mich. Comp. Laws Ann. § 712A.19a(f) (West Supp. 1979); Oklahoma, Okla. Stat. tit. 10 § 1130.A(3) (West Supp. 1978); Utah, Utah Code Ann. § 78-3a-48(1)(c) (1977). Other states require additional findings that conditions will continue and that parents were offered rehabilitative services: Indiana, Ind. Code § 31-6-5-4 (Supp. 1979); Iowa, Iowa Code § 232.114 (West Supp. 1979); Louisiana, La. Rev. Stat. Ann. § 13:1601.B, D (West Supp. 1975); Maryland, Md. Ann. Code art. 16 § 75 (Supp. 1979); Minnesota, Minn. Stat. § 260.221(b)(5) (Supp. 1980); Missouri, Mo. Ann. Stat. § 211.447(2)(h) (Vernon Supp. 1980); Nebraska, Neb. Rev. Stat. §§ 43-202(2), 43-209(6) (1972); New Hampshire, N.H. Rev. Stat. Ann. § 170-C:5(III) (1978); New York, N.Y. Fam. Ct. Act § 614.1 (West 1979); North Carolina, N.C. Gen. Stat. § 7A-289.32(3) (Supp. 1979); Oregon, Or. Rev. Stat. § 419.523(2)(e) (1978); South Carolina, S.C. Code §§ 20-11-20(2)(a), 20-11-40 (1976); Tennessee, Tenn. Code Ann. §§ 37-238(d), 37-238(2) (1977); Virginia, Va. Code §§ 16.1-283(B), (C) (Supp. 1979); Washington, Wash. Rev. Code Ann. §§ 13.34.180, 13.34.190 (Supp. 1979); Wisconsin, Wis. Stat. Ann. § 48.40(2)(e) (West Supp. 1979).

[43] Problems of notice, discriminatory application and chilling effect are aggravated by "double ambiguity" as this Court has seen in the abortion context, *Colautti* v. *Frankin*, 439 U.S. 379,

Despite the realities of the length of time children spend in foster care, social workers and judges view the initial removal from the home as a temporary measure, neither harmful to children's interest in permanence nor destructive of the family unit. This view is consistent with the stated purpose of neglect statutes and of foster care. At the initial removal, it is not clear that the child will be severely harmed by removal unless it is admitted that placement is not temporary and will often lead to long and harmful stays in foster care. However, at termination, it is clear that the family unit will be destroyed and the child subjected to the harms of separation and that often there is no guarantee the child will leave foster care for a new permanent family through adoption.[44] In light of this, some judges and social workers are often reluctant to terminate whatever family ties remain.

In addition, social workers and judges often share the country's ideological commitment to the natural family and are, therefore, reluctant to terminate, although they do not see reunification of the family as a possibility.[45] Vague standards are thus to a significant extent responsible for the foster care limbo.

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99 S. Ct. 675, 685 (1979), when the Court invalidated a law which was vague as to the stage of development requiring the exercise of a special standard of care as well as to the standard for judgment.

[44] Termination of parental rights in and of itself does not mean that a child will be adopted, although termination is a necessary step preceding adoption. In fact, some state termination statutes specifically require that efforts be taken to seek prompt adoptive placement after termination, and that the court be advised of the status of such efforts. *See,* for example, D.C. Code § 16-2360 (West 1967); Wash. Rev. Code § 13.34.210 (Supp. 1979).

[45] As one child welfare worker expressed it, "Judges sometimes become rather sentimental about abandonment proceedings. They don't want to be the one who 'took the child from the mother.' " Note, *Child Abandonment: The Botched Beginning of the Adoption Process,* 60 Yale L.J. 1240, 1242 n.11 (1951). *See* Children's Defense Fund, *supra* note 16, at 27-29.

C. Vague standards were not developed to ensure family integrity.

The statutes, from which come key concepts of what constitutes grounds for removal of a child from the home and termination of parental rights, were based on notions that certain parental characteristics were *per se* grounds for separating families. The first statutes were enacted in the colonies in the seventeenth century. These standards were aimed at the children of the poor and were in that regard specific. In the eighteenth century terms like "incapable of bringing up or supporting their child" were added, but the statutes were rarely used against others than the poor. Areen, *supra* note 9, at 899-900; tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status, Part I,* 16 Stan. L. Rev. 257 (1969). Although poverty has been rejected as a ground in and of itself for state intervention by the courts and by our national commitment of financial aid to preserve the integrity of poor families, it is still listed directly or indirectly as a ground for neglect proceedings in several states. Areen, *supra* note 9, at 926.

In the latter part of the last century, neglect and dependency, like delinquency,were seen as grounds for removing children permanently from their parents in order to prevent a life of crime.[46] The concept was one of "preventive penology": the conditions of the home which led to crime, including poverty and immorality of parents, were to be identified and children to be

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[46] For purposes of setting out the responsibilities of the Delaware Division of Social Services for the care and custody of children, the definition of "neglected child" includes "a child . . . who associates with vagrant, vicious or immoral persons." Del. Code tit. 31 § 301 (1974).

removed from homes which exhibited such conditions. Thomas, *supra* note 9, at 324; Fox, *Juvenile Justice Reform: An Historical Perspective,* 22 Stan. L. Rev. 1187, 1193 (1970). Again these statutes were often specific as to what was an immoral person. Areen, *supra* note 9, at 903.

In the twentieth century while attitudes toward permanently severing family ties because of parents' life styles have changed, statutory standards have not. Now there is widespread recognition that the maintenance of a child in a home offers the child the best opportunities for development. Beck, *supra* n. 8. The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 7 (1967). Almost all state neglect laws contain purpose clauses which reiterate that belief.[47] Although the precursor of the AFDC program limited aid to those who were considered "morally fit," *King* v. *Smith,* 392 U.S. 309, 321 (1968), in the AFDC program Congress determined that immorality and illegitimacy

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[47] The Delaware Code provides as the purpose for state intervention:

> In the firm belief that compliance with the law by the individual and preservation of the family as a unit are fundamental to the maintenance of a stable, democratic society, the General Assembly intends by enactment of this chapter that one court shall have original statewide civil and criminal jurisdiction over family and child matters and offenses as set forth herein. The court shall endeavor to provide for each person coming under its jurisdiction such control, care, and treatment as will best serve the interests of the public, the family, and the offender, to the end that the home will, if possible, remain unbroken and the family members will recognize and discharge their legal and moral responsibilities to the public and to one another.

Del. Code tit. 10 § 902 (1974). Other state purpose clauses are similar. Katz, *supra* note 11, at 70.

should be dealt with through rehabilitative measures. *Id.* at 325.[48] But child welfare statutes have not been modified to reflect these changes.

With the juvenile court movement in the twentieth century, the concept that broad and vague standards would encourage individualized decision-making to meet the unique needs of each child was introduced into neglected child proceedings but it has failed there as it failed in the juvenile delinquency area.[49] Instead, "parents patriae" power was and still is used to punish parents rather than further the children's interests and meet their needs.[50]

The use of the "best interests of the child" standard as a guide to the choice of disposition[51] for

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[48] The Aid to Families with Dependent Children program which offers funds to states for support of needy children stated the national goal of keeping children in their homes and funding "protective services" for that purpose as the preferred alternative for the care of children who are dependent, neglected or "in danger of becoming delinquent." 42 U.S.C. § 601 (1974).

[49] This Court has found, "[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault,* 387 U.S. at 18. The "vague and overbroad grounds for delinquency adjudication" have been noted by at least one member of this Court. *McKeiver* v. *Pennsylvania,* 403 U.S. 528, 553 (1970) (White, J., concurring). There has been widespread criticism of vague standards in the juvenile area. Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court,* 82 Yale L.J. 745, 768 n.137 (1963).

[50] The children who were brought to court under juvenile court statutes as neglected were and are still often treated similarly to those brought to court as "delinquent." Note, *Developments in the Law, supra* note 2, at 1225-26; Thomas, *supra* note 9, at 300-07; Note, *Child Neglect: Due Process for the Parent,* 70 Col. L. Rev. 465, 469 (1970).

[51] "Best interests" is used in many statutes to direct the disposition of the child after a finding that there exist grounds for removal and/or termination. Wald I, *supra* at 634-35.

children was also not developed to ensure family permanence. It was developed to decide custody disputes between parents.[52] Such disputes, unlike termination proceedings, are the result of voluntary actions on the part of family members to destroy the integrity of the family unit. Children are not faced with the total loss of continuity and permanence that they face when the state is taking them from both parents.[53]

Thus although the wording of neglect and termination statutes remains, in some states, much as it was in the nineteenth century, the statutory goals of intervention as well as the knowledge of how best to protect children have changed radically. The retention of vague statutory language has meant that social workers and judges are not guided in furthering the current goals of state intervention into families.

When a decision has such profound effects on the fundamental interest of a child[54] and can cause such great harm as the decision to permanently remove a child from the home, vague statutes whose only guidance to state officials is to remove from "unfit" parents when in the "best interests of the child" fail to protect children from harmful decisions.

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[52] The first reported judicial use of the standard was in 1840 in *Mercein* v. *People,* 35 Am. Dec. 653 (N.Y. 1840), where the court was faced with a custody dispute between a father and a mother. Areen, *supra* note 9, at 900 n.74.

[53] As one commentator has argued, private disputes over child custody do not implicate, as do disputes over state neglect interventions, "profound questions of political and moral philosophy concerning the proper relationship of children to their family and the family to the state." Mnookin I, *supra* note 21, at 226, 268.

[54] The "best interest of the child" standard is used in many contexts other than custody decisions. Its use has been criticized in these contexts also. *See, e.g., Belotti,* _____ U.S. _____, 99 S. Ct. at 3054 (Stevens, J., concurring) (use of best interests to decide

III. Standards Governing Termination Decisions Can And Must Provide Specific Guidelines Which Focus On The Child's Needs To Ensure Protection Of The Family Unit And To Minimize Harm To Children.

The elimination of vague standards is essential, but this Court must also provide guidance to others to ensure a system in which family integrity is protected, harm to children minimized, and constitutional rights protected. Due process requires statutory standards which focus on the interests and needs of the child, not merely on parental misconduct, to ensure termination decisions are made appropriately and only when there are the requisite "compelling" interests.

Standards can be drawn which are specific and which reduce the risk of harm to children and parents. Psychological and sociological research supports the use of specific standards which are based on considerations reflecting the interests and needs of the child. Model codes have been drafted which incorporate these concepts and states have acted to adopt these more specific standards.

A. Standards for termination must focus on the child.

Present standards for termination lead to decisions which do not consider the interests of the child but focus on parental conduct alone. As we argued above, standards which focus solely on parental misconduct, even if specific, do not promote family integrity and are

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whether to allow abortion); Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy,* 86 Yale L.J. 645 (1977) (use of best interests to decide whether to intervene in medical decision concerning child).

not consistent with our national commitment to the family. Termination of parental rights may lead only to the perpetual limbo of foster care and its harmful effects, in addition to the other harms caused by separation from the family for the child. Before embarking on a course which may result in such great harm to a child, the state must ensure that a decision is made that the harm of remaining in or returning to the home, along with the child's interest in a new permanent family, outweigh these concerns. See pp. 15-16 *infra*.

Standards which focus on the needs of the child, rather than on arbitrary notions as to proper child-rearing and home conditions, promote family integrity by limiting the removal of children and the break-up of the family to situations of "compelling" need, where it is necessary to protect children and ensure continuous and permanent family relationships. Finally, in cases where return home is impossible or inappropriate, such standards make it easier for judges and social workers to make difficult decisions and to begin the process of finding the child a new permanent family. See pp. 28-30 *infra*.

The protection of children's fundamental interests in continuous and permanent family relationships demands that standards for termination require decision-makers to weigh relative harms to the child.

B. Standards for termination of parental rights can contain specific guidelines which focus on the child's needs.

It is the task of state legislators to draft new and constitutionally adequate standards for termination. However, this Court should give guidance to them as to the contours of an interest compelling enough to justify terminating family ties.

There are five basic considerations which can be measured and which can guide decision-makers to terminate parental rights only when necessary to protect children's and parents' fundamental interests. These five considerations (age of the child, length of time in care, attempts made to eliminate the harms resulting in removal and the likelihood of reunification, relationship of the parent and child, and relationship of the child and his or her caretaker) must all be addressed to ensure a decision to terminate the parent-child relationship is in fact in the best interests of the child. We are not suggesting that a statute is sufficiently specific if it simply lists these five factors as matters which can be considered. Rather, we maintain that these factors should guide legislators in drafting statutes which specify how the factors are to be applied.

Recent statutory changes have been made in some states which reflect these five key considerations and which provide specific guidance to decision-makers. Model codes which reflect these considerations have been drafted by several eminent bodies. Model Adoption Legislation and Procedures Advisory Panel,[55] *Model State Adoption Act and Model State Adoption Procedures, reprinted in* 45 Fed. Reg. 10622, 10686 (1980)

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[55] The Model Adoption Legislation and Procedures Advisory Panel was established pursuant to the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. § 5101 *et seq.* (1977), as an independent expert panel to recommend to the Secretary of the United States Department of Health, Education and Welfare model legislation and procedures relating to adoption, with special attention to barriers to the adoption of special needs children. The Panel is composed of a state legislator, state child welfare administrator, a juvenile court judge, a birth parent, adoptive parent, and others with expertise in child welfare. The model law as submitted by the Panel to the Secretary has been published for public comment, 45 Fed. Reg. 10622 (1980).

[hereinafter cited as Model State Adoption Act]; Institute of Judicial Administration, American Bar Association, *Standards Relating to Abuse and Neglect* (Tentative Draft) (1977) [hereinafter cited as ABA Draft Standards]; Neglected Children Committee, National Council of Juvenile Court Judges, *Lincoln Model Statute for Termination of Parental Rights,* 27 Juvenile Justice 3 (1976) [hereinafter cited as Lincoln Model Statute].

Further elaboration on each of the criteria, and how these criteria have guided recent statutory amendments and the drafting of model codes is set forth below.

1. *Age of Child.* A child's age is intimately related to his interest in permanence and in a continuous family relationship. Disruptions of continuity have different consequences for children of different ages.[56] Decisions concerning termination should reflect consideration of the age of the child in relation to the length of time the child has been separated from his or her family and the child's capacity to maintain existing relationships or develop new interpersonal relationships.[57] The impact of

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[56] "The significance of parental absences depends, then, upon their duration, frequency, and the developmental period during which they occur. The younger the child, the shorter is the interval before a leave-taking will be experienced as a permanent loss accompanied by feelings of helplessness and profound deprivation. Since a child's sense of time is directly related to his capacity to cope with breaches in continuity, it becomes a factor in determining if, when, and with what urgency the law should act." Goldstein, Freud, and Solnit, *supra* note 6, at 42.

[57] For example, the longitudinal study of 624 children in foster care in New York City revealed that the younger children were more likely to maintain the greater level of attachment to their families than the children who entered care at an holder age. Fanshel and Shinn, *supra* note 18, at 402-404.

a lingering discontinuous relationship, for example, may be more harmful for children of certain ages than for others. The ABA Draft Standards §§ 8.3A,B provide that consideration of termination is triggered by different periods of parent-child separation depending on the child's age.

Age also affects the extent to which a child's wishes should be considered in a decision to terminate. In some states, for example, statutes specify that parental rights shall not or need not be terminated if the child is of a certain age and objects to the termination. Va. Code § 16.1-283E (Supp. 1979) (fourteen years of age or age of discretion determined by court); Iowa Code § 232.114(6)(b) (West Supp. 1979) (over ten years of age); W.Va. Code § 49-6-5(6) (Supp. 1979) (fourteen years of age or age of discretion as determined by the court); Cal. Welf. & Inst. Code § 366.5(e)(1)(B) (West Supp. 1979) (fourteen years of age or older); Model State Adoption Act § 313(d)(6) (termination where child over ten years of age consents to adoption and has been out of home three years); ABA Draft Standards § 8.4E (child over ten years of age can object).

Similarly, the child's age is relevant in considering a child's desire to remain with a caretaker with whom the child had developed a relationship over time.

2. *Length of Time in Care.* The length of time since separation from the parent is an important consideration in determining the appropriateness of termination. Numerous studies have documented that the probability of a child's returning home is greatest earlier in placement and decrease rapidly after the child has

been in care for from eighteen months to two years.[58] The likelihood of multiple placements and lack of meaningful parental contact also increases with the length of time children are in care, and thus the likelihood of severe harm to the child from lingering in foster care is increased.[59] The length of time since separation from the natural parent and the extent of contact with the parent during the time of separation are also relevant to an evaluation of the child's relationships with his or her parents and present caretaker.

In some states the grounds for termination change as the length of time in care increases. In Iowa, for example, when a child has been adjudicated in need of assistance and has been in care for at least six but less than twelve months, the court may order termination if there is clear and convincing evidence that the child cannot be returned to his/her parents and that the parents have not maintained contact during the previous six months and made no reasonable efforts to resume care despite an opportunity to do so. When a child has been in care for twelve months or longer, contact and efforts to resume care are no longer required considerations. Iowa Code §§ 232.114(4), (5) (West Supp. 1979).

Model statutes suggest similar alterations in standards depending on length of separation. Model State Adoption Act §§ 313(d)(5), (6), 313(e) (standard of review where child has been out of home for one year

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[58] Fanshel and Shinn, *supra* note 18, at 116-123; Maas and Engler, *supra* note 21, at 420; Vasaly, *supra* note 16, at 54.

[59] Fanshel and Shinn, *supra* note 18, at 98-99, 110-111; Vasaly, *supra* note 16, at 54-56. For documentation of the harms incurred, *see* note 26 at page ____, *supra*; Sherman, Neuman and Shyne, *Children Adrift in Foster Care: A Study of Alternative Approaches* 3 (1973)

requires detailed findings, *id.* at §§ 313(d)(5), 313(e), but where child has been out of home three years and is over ten, child can consent to adoption and termination can proceed without further findings, *id.* at § 313(d)(6)).

3. *Attempts to Eliminate Harms and the Likelihood of Reunification.* The progress in eliminating the specific harms which led to the child's removal and placement in foster care must be assessed to determine the likelihood that the child wil be able to return home within a specified time period. The provision of rehabilitative services can facilitate and make possible return home.[60] In evaluating whether or not termination is in a child's best interest, progress toward reunification must be weighed together with the length of time the child has been in care and his or her relationship with natural parents and other caretakers.

A number of state termination of parental rights statutes now specifically direct the court to consider the effect and amount of services provided to the parent to facilitate reunification and/or parental visitation or contact. See, for example, Ky. Rev. Stat. § 199.603(3) (Supp. 1978); Va. Code §§ 16-1-283 B, C (Supp. 1979); Iowa Code § 232.114 (West Supp. 1979); Wash. Rev. Code Ann.§§ 13.34.180(5),(6) (Supp.1979); Ind. Code § 31-6-5-4 (3) (Supp. 1979); W.Va. Code §§ 49-6-5(a),(b) (Supp.1979); Vt. Stat. Ann. tit. 3 § 667(4) (Supp. 1979); Lincoln Model Statute § 12(1)(g); Model State Adoption Act § 313(e) (1).

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[60] Studies have shown that when services are provided to the family, harmful situations can be elilminated and families can be reunited. *See*, Jones, Neuman and Shyne, *A Second Chance for Families: Evaluation of a Program to Reduce Foster Care*, 121-123 (1974); and Pike, *Permanent Planning for Foster Children: The Oregon Project*, 5 Children Today 22-25, 51 (1976).

4. *Relationship of the Parent and Child.* The emotional attachment of the parent and child is crucial to an assessment of the harm which will be caused by termination of the parent-child relationship. The relationship of the parent and child at the time of the termination proceeding can be measured by the expressed attitudes of each and the degree of contact while the child has been in placement. Studies have demonstrated that children with sufficient parental contact stay in foster care for shorter periods and experience fewer placements, thereby minimizing the harms incurred from placement.[61] Parental visiting has been shown to be a significant predictor of the likelihood that a child will be able to return home.[62] However, the significance of contact for an individual child may also vary with the age of the child.

Iowa law governing termination of parental rights, for example, specifically provides that regardless of the existence of grounds for termination, "the court need not terminate the relationship between parents and child if the court finds:. . .there is clear and convincing evidence that such termination would be detrimental to the child at the time due to the closeness of the parent-child relationship. . . ." Iowa Code § 232.114(6)(c) (West Supp. 1979).

One model statute directs the court to consider the "feelings and emotional ties of the child with respect to his parents," and to evaluate the effort the parent has made to facilitate the child's return, including regular visitation or contact, provision of support, and regular

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[61] Fanshel and Shinn, *supra* note 18, at 93-99; Shapiro, *Agencies and Foster Children* 32-34 (1976); Vasaly, *supra* note 16, at 64-65.

[62] Fanshel and Shinn, *supra* note 18, at 93-99; Vasaly, *supra* note 16, at 63. See also note 18, *supra.*

communication with the child's custodian. Model State Adoption Act §§ 313 (e) (3), (4). *See also* Lincoln Model Statute § 12(2); ABA Draft Standards § 8.4A.

5. *Relationship of the Child and the Child's Caretaker.* The relationship of the child and the child's caretaker and the child's chance for a permanent relationship in a new family must be weighed in a termination decision. The extent of this relationship can be measured by the length of time together, the age of the child when it commenced, expressed attitudes toward each other and the caretaker's willingness to ensure permanence for the child.[63]

A child who has been with a substitute caretaker for a long period of time may form a "psychological" parent relationship with that caretaker. The child's need for a family (the need for acceptance, continuity of relationships, a sense of stability in emotional attachments) may be met by these other parents and it may be extremely harmful to a child to end such a relationship. Goldstein, Freud, and Solnit, *supra* note 6. In situations where the caretaker wants to form a permanent relationship with the child, as through adoption, the interests and desire of the child may be the cementing of the relationship with this "psychological parent." In *OFFER,* 431 U.S. at 835, this court recognized the warmth of ties that may form between child and foster parent. The relationship of the child and the caretaker is critical to

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[63] It has been recommended that when termination of parental rights occurs incidental to a petition for adoption of a child by a psychological parent that the termination order should be dissolved if the adoption of the child by that parent is not effected within six months (under six years old) or one year (over six). Ketcham and Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights,* 29 Rutgers Law Rev. 530, 555-556 (1976).

assessing the harm to a child that will result from uprooting him or returning him home.[64]

A number of states and model statutes detailing criteria for assessing the appropriateness of termination include factors which are relevant to the child-caretaker or child-psychological parent relationship. Vermont, for example, assesses the interaction and interrelationship of the child both with his natural parents and with his "foster parents if any." Vt. Stat. Ann. tit. 33§ 667 (Supp. 1979). The District of Columbia, in determining whether it is in the child's best interest that the parent and child relationship be terminated requires that a judge consider "the quality of the interaction and interrelationship of the child with his or her parent, siblings, relatives and/or caretakers, including the foster parent." D.C. Rev. Code Ann. § 16-2353 (b)(3) (Supp.1978). In Washington State, a petition seeking to terminate the parent-child relationship must allege, among other things, "that continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." Wash. Rev. Code Ann. § 13.34.180 (4) (Supp. 1979).

One model statute directs the court to consider the child's ties with the caretaker family, the capacity and disposition of that family to give the child "love, affection, and guidance", the length of time the child has lived in a "stable, satisfactory environment" and the desirability of maintaining the continuity and the permanence as a family unit of the child's placement family, Lincoln Model Statute § 12(3). *See also* Model State Adoption Act. § 313 (d) (6).

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[64] Buxbaum, *supra* note 7, at 21; Geiser, *supra* note 7, at 88-90; Goldstein, Freud and Solnit, *supra* note 6, at 17-19.

Only through statutes which incorporate consideration of key factors and provide specific guidelines to judges and social workers will children's fundamental interests be protected. We, therefore, maintain that the Court must not only invalidate the Delaware statute as vague, but must provide guidance as to what are constitutionally adequate standards in this delicate area.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the decision of the Delaware Supreme Court.

Respectfully submitted,

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